



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 210 OF 2015

(FORMERLY KERUGOYA ELC NO. 467 OF 2013)

CHARLES NJERU MUGANE.....1ST PLAINTIFF

JOSEPH MUTHEE MURATHI.....2ND PLAINTIFF

VERSUS

HENRY NDWIGA KIURA.....DEFENDANT

JUDGEMENT

1. By a plaint dated 17th August 2007, the Plaintiffs sought the following reliefs against the Defendant:

- a) *Eviction of the Defendant from parcel of land No. Gaturi/Nembure/2657.*
- b) *Costs of this suit.*
- c) *Interest on (a) and (b) at court rate.*
- d) *Any further relief this honourable court may deem fit to grant.*

2. The Plaintiffs pleaded that they were the registered proprietors of half share of *Title No. Gaturi/Nembure/2657* (hereinafter *the suit property*) upon which the Defendant was allegedly trespassing without lawful justification or excuse.

3. The Defendant filed a statement of defence dated 10th November 2007 which was subsequently amended on 23rd March 2009 and 23rd January 2018. The latter amendment introduced a counterclaim against the Plaintiffs. By his defence, the Defendant denied that the Plaintiffs had any proprietary interest in the suit property. The Defendant also pleaded that the suit was fatally defective since the Plaintiffs were trying to relitigate a matter which had already been determined in *Embu High Court Succession No. 886 of 2002 – In the Matter of the Estate of Njeru Wamishi*.

4. The Defendant pleaded that the Plaintiffs' claim over the suit property was based on misrepresentation of material facts in *Succession Cause No. 1251 of 1999 – In the matter of the Estate of William Patrick Mugane*.

5. By his counterclaim, the Defendant pleaded that the Plaintiffs had all along been claiming half share of the suit property without lawful justification. The Defendant pleaded that at no time did the original owner of the suit property Njeru Wamishi (hereinafter *Wamishi*) ever transfer half share to the Plaintiffs' father, William Mugane (hereinafter *Mugane*).

6. The Defendant contended that the transfer of ½ share to Mugane was fraudulent on account of the particulars pleaded in paragraph 16 of the counterclaim. The particulars were stated as follows:-

- a) The signature of Wamishi was forged.
- b) There was no valid letter of consent from the Land Control Board (LCB).
- c) Using a letter of Land Control Board consent issued in 1979 for a transfer undertaken in 1973.
- d) Purporting to acquire the suit property as a gift whereas there was no such gift.

e) Using false identity card numbers.

7. Consequently, the Defendant sought the following reliefs in the counterclaim:

a) An order for cancellation of the names of Charles Njeru Mugane and Joseph Muthee Murathi from the register of land parcel No. Gaturi/Nembure/2657.

b) A declaration that Njeru Wamishi was the bona fide registered proprietor of land parcel No. Gaturi/Nembure/2657.

c) Costs of the suit and counter claim.

8. At the trial hereof, the 1st Plaintiff testified on his own behalf and on behalf of his co-plaintiff. The 1st Plaintiff (PW1) adopted his written statement dated 11th June 2018 as his sworn testimony. His evidence was that the Plaintiffs inherited ½ of the suit property from their late father (Mugane) who was a co-proprietor in common with Wamishi. They acquired the said share in *Succession Cause No. 9 of 2016 (formerly Nairobi High Court Succession No. 1251 of 1999)* upon confirmation of grant.

9. It was the Plaintiffs' case that upon the advice of the Land Registrar they prepared a mutation for sub-division of the suit property into two but it could not be registered due to some encumbrances in the land register. The Defendant was said to be in occupation of the entire suit property hence the Plaintiff could not access their share of the suit property.

10. PW1 further stated that the Defendant was the administrator of the estate of Wamishi in *Embu High Court Succession Cause No. 345 of 2007 (now Succession Cause No. 886 of 2002)* whereby distribution of the estate of the deceased was in dispute. There were at least 6 protestors challenging confirmation of the grant. The Plaintiffs, therefore, wanted to have their ½ share in the suit property since its distribution was not in dispute.

11. On the issue of the fraud alleged by the Defendant, PW1 denied knowledge of any such fraud. He stated that he was still a young boy in 1973 when Mugane acquired ½ share of the suit property. He was not privy to any transactions which may have taken place between Mugane and Wamishi. He further stated that Mugane died in 1992 whereas Wamishi died in 1981. It was his case that there were no cases over the suit property between them during their lifetime.

12. The Defendant testified on his own behalf as the sole witness at the trial hereof. He adopted his witness statement dated 7th June 2018 as his sworn testimony. He also produced the documents listed in his list of documents dated 7th June 2018 as exhibits. He stated that the suit property truly belonged to his late grandfather, Wamishi and that the Plaintiffs were not entitled to any share thereof.

13. It was the Defendant's case that Wamishi's signature on the transfer form was forged; that the transfer of ½ share was effected without the requisite consent of the Land Control Board, and that the ID card number quoted in the land register did not belong to Wamishi. It was his case further that the High Court in *Embu Principal Magistrate's Succession Cause No. 87 of 1985* had found that the 1973 transfer of ½ share to Mugane was unprocedural and fraudulent.

14. During cross-examination by the Plaintiffs' advocate, the Defendant stated that he was about 10 years old in 1973 when the transfer to Mugane (entry No. 46 in the land register) was effected. He also conceded that he was not privy to what Wamishi may have done in 1973 and that he did not always accompany him wherever he went.

15. Upon conclusion of the hearing, the Plaintiffs were given 30 days to file and serve their submissions whereas the Defendant was to file and serve his within 30 days upon service. The record shows that the Plaintiffs filed their submissions on 18th February 2019 whereas the Defendant filed his on 14th June 2019.

16. The court has noted that the parties herein did not file an agreed statement of issues for determination in this suit. In the premises, the court shall frame the issues as required by law. Under **Order 15 Rule 2 of the Civil Procedure Rules**, the court may frame issues from any of the following:

a) The pleadings.

b) Allegations made on oath by or on behalf of the parties.

c) The contents of documents produced by the parties.

17. The court has considered the pleadings, documents and the evidence of the parties in this suit. The court is of the opinion that the following issues arise for determination in this suit:

a) Whether the Plaintiffs' father Mugane, obtained registration of ½ share of the suit property fraudulently.

b) Whether the Plaintiffs are the lawful proprietors of ½ share of suit property.

c) Whether the Plaintiffs' suit is fatally defective or *res judicata* by virtue of *Embu H.C. Succession cause No. 886 of 2002*.

d) Whether the Plaintiffs are entitled to the reliefs sought in the plaint.

e) Whether the Defendant is entitled to the reliefs sought in the counterclaim.

f) Who shall bear the costs of the suit and the counterclaim.

18. The court has considered the evidence on record, both oral and documentary, and the respective written submissions of the parties on the 1st issue. It is common ground that the Plaintiffs and the Defendant were small children at the time the disputed Entry No. 4 in the land register was made on 29th June 1973. The Defendant mainly relied on circumstantial evidence in his bid to impeach the transfer of ½ share to Mugane. There is no doubt that the burden of proof on this issue squarely lies upon the Defendant under the provisions of **sections 107-109 of the Evidence Act (Cap. 80)**.

19. The first among particulars of fraud pleaded in the counterclaim is that the relevant transfer form was forged. The Defendant contended that upon comparing the signature in the transfer form and the one in the copy of Wamishi's national ID card, the one in the transfer form was a forgery. It was submitted that the thumb print appearing in the ID card was bigger and broader whereas the one in the impugned document was narrower!

20. The court is unable to agree with the Defendant's contention on the genuineness of the thumb-print in question. The Defendant did not introduce himself as finger-print expert at the trial. He only introduced himself as a farmer. Whereas it is not impossible for a farmer to also double up as a finger-print expert, the Defendant did not adduce any evidence to enable the court to believe that he possesses the expertise of the latter. The court is aware that comparison of finger print images is a technical matter which requires training and expertise. The Defendant did not call any expert either from the National Registration Bureau or elsewhere to tender evidence on the issue. No expert report was produced either expressing an opinion on the said signatures.

21. In the case of **Mutonyi V Republic [1982] KLR 203** at page 210 the Court of Appeal stated as follows regarding expert evidence:

“Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.

Section 48 of the Evidence Act (Cap. 80) provides that where, *inter alia*, the court has to form an opinion upon a point “of science or art, or as to identity or genuineness of handwriting or finger or other impressions”, opinions on that point are admissible if made by persons “specially skilled” in such matters.”

22. The court has noted that some of the impugned forms do not bear a thumb-print but some sort of signature. The Defendant conceded at the trial that he did not know whether his grandfather had more than one signature. There was no evidence by any other witnesses to the effect that they had previously seen Wamishi sign documents and that they were familiar with his signature. There was really no evidence from the Defendant's side to back up the allegation of forgery.

23. The second among the particulars of fraud was that either there was no valid consent of the Land Control Board or that the consent was obtained out of time. It was contended by the Defendant that entry No. 4 was made on 29th June 1973 whereas the consent of the Land Control Board was purportedly obtained in 1979 which was a period of 6 years after transfer.

24. The court has examined all the relevant documents on record on this aspect. The documents produced by the Land Registrar Embu indicated that the application for consent was dated 16th June 1973 whereas the consent letter was dated 21st June 1973. The transfer form dated 19th June 1973 was then registered on 29th June 1973. When the land registrar was shown a copy of the Defendant's letter of consent dated 1979 in the Defendant's list of documents, she stated that there was only one copy of the letter of consent dated 21st June 1973 in her file. The letter of 1979 was apparently not in the parcel file at the lands office. The Land Registrar further stated that there was nothing irregular about Entry No. 4 since all the documents in support thereof were available in the parcel file.

25. The court has noted that the copy of the consent letter dated 1979 which the Defendant produced as Exhibit D-4 is not certified or stamped by any public authority. Its origin and authenticity remains unknown. The court believes as authentic the documents which the Land Registrar produced in support of entry No. 4 in the land register. The consent of the Land Control Board was clearly obtained on 21st June 1973 before registration of the transfer and not 6 years later as alleged by the Defendant.

26. The other aspect of fraud pleaded by the Defendant was that Mugane purported to acquire ½ share of the suit property as a gift whereas there was no such gift. The Defendant conceded that he was a small boy of about 10 years in 1973. He conceded that he was not privy to all transactions and dealings which Wamishi may have had. The Defendant did not call any evidence to support this allegation apart from his bare statement to that effect. The court finds that there was no evidence to contradict the giving of the gift as recorded in official records by both the Land Control Board and the Land Registrar.

27. The last allegation of the alleged particulars of fraud stated that false ID card numbers were used in the transfer. It was submitted that the card number appearing in the land register was different from the one appearing in the copy of Wamishi's card in the Defendant's possession. The court does not find that any aspect of fraud has been proved here against Mugane or the Plaintiffs. First, it was not demonstrated who supplied the ID card numbers which were entered in the register. Was it Mugane or Wamishi? Second, it was not demonstrated that indeed, the copy of the card in the Defendant's possession is the genuine one. That copy was not certified by any public authority or even a commissioner for oaths as a true copy of the original. Third, the copy in the Defendant's possession was used in 1979 whereas the transfer in issue took place in 1973.

28. The court finds that none of the particulars of the alleged fraud on the part of Mugane have been proved to the required standard. It has been held that allegations of fraud are serious allegations which must be adequately proved. See **R.G. Patel V Valji Makanji [1957] EA**

314. In the case of *Evans Otieno Nyakwana Vs Cleophas Bwana Ongaro [2015] eKLR* Majanja J held, *inter alia*, that;

“In this case, it is the Respondent who filed the defence and counterclaim and alleged that the document relied upon by the Plaintiff was a forgery. It was therefore incumbent upon him to prove this fact by marshalling the necessary evidence to support his case. The burden of proof to prove fraud lay upon the Respondent. As regards the standard of proof, I would do no better than quote Central Bank of Kenya Ltd Vs Trust Bank Ltd and 4 Others Nai Civil Appeal No. 215 of 1996 (UR) where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that;

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of *prima facie* proof was much heavier on the Appellant in this case than in an ordinary civil case”.

29. In view of the finding that the Defendant has failed to prove the fraud and particulars of fraud alleged against Mugane, there would be no need to disturb entry No. 4 in the land register. There was no evidence on record to demonstrate that Wamishi ever complained during his lifetime that Mugane had fraudulently acquired ½ share in the suit property. There was no evidence that Wamishi ever sought either through court or through alternative dispute resolution mechanisms to recover ½ share of the suit property from the late Mugane. The 1st issue is consequently answered in the negative.

30. The 2nd issue is whether the Plaintiffs are the lawful proprietors of ½ share of the suit property. The court has holistically considered the material evidence on record on this issue. The court has also considered the submissions on record on the matter. There is adequate evidence on record to demonstrate that the Plaintiffs acquired the suit property through *Succession Cause No. 9 of 2016 – In the Matter of the Estate of William Mugane*. The only interest they could possibly acquire was only ½ share which their late father had in the suit property, no less and no more.

31. The court has had the advantage of perusing the court files in the two succession causes relating to the estate of Mugane and the estate of Wamishi respectively. It is very clear that in their application for a grant in *Succession Cause No. 9 of 2012* the Plaintiffs made a truthful declaration that the late Mugane held ½ share in the suit property. That is what was declared in Form P & A 5, the affidavit in support of the petition dated 14th January 1999. The Plaintiffs did not declare that Mugane was the proprietor of the entire suit property. The only error which took place thereafter was the omission by the succession court to specify in the certificate of confirmation of grant that the Estate of Mugane was only entitled to ½ share. However, the Land Registrar was not misled in any manner as he entered the correct details in the land register. The estate of Wamishi did not, therefore, suffer loss of property or any other prejudice by reason of the omission in the certificate of confirmation of grant. That error can be corrected in such manner and on such terms as the succession court may deem fit.

32. The court has noted the Defendant’s lamentation that the Land Registrar erred in registering the Plaintiffs as proprietors of only ½ share instead of the entire suit property as noted in the certificate of confirmation of grant. That is such a mischievous submission. If the Land Registrar had fallen into error by purporting to register the Plaintiffs as absolute owners of the entire suit property, the Defendant being the administrator of the estate of Wamishi would definitely have moved the succession court for revocation of grant.

33. Be that as it may, the material on record reveals that the Defendant nevertheless filed an application for revocation of the grant in *Embu Succession Cause No. 9 of 2012 – In the Matter of the Estate of William Mugane*. Although the grounds for seeking revocation of that grant are framed differently, the central point of the Defendant’s grievance is that the Plaintiffs herein are strangers who have no right to inherit any portion of the suit property at all. The Defendant contended that the Plaintiffs had failed to disclose to the succession court that he (the Defendant) was the sole heir to the estate of the late Wamishi hence entitled to the entire suit property.

34. There is no doubt on the basis of the pleadings, documents and evidence on record that the Plaintiffs are not claiming the entire suit property as alleged by the Defendant. The Plaintiffs are only claiming what they believe their father, Mugane was entitled to. The grant they obtained in *Succession Cause No. 9 of 2016* appears to be in respect of the estate of Mugane. If there were any irregularities or misrepresentation by the Plaintiffs in obtaining the grant or certificate of grant in the said matter, it is a matter which falls within the competence of the succession cause to remedy in any manner it may deem just and fit under the **Law of Succession Act (Cap. 160)**.

35. The Defendant contended at the trial hereof and through his written submissions that the Plaintiffs cannot be lawful owners of any share in the suit property because the *Principal Magistrate’s Court Succession Cause No. 87 of 1985* determined that Mugane’s registration as co-proprietor of the suit property in 1973 was irregular. The court has carefully perused the proceedings of that case which were produced by the Defendant as Exhibit D-6. The court is unable to find any judgement, ruling, decree or order where such declaration was made.

36. What appears from the scanty record of proceedings produced by the Defendant is that the Plaintiff’s father who was appointed an administrator of the estate of Wamishi had challenged an arbitration award made by some elders in favour of Mugane who was the objector in the proceedings. The record shows that by consent of the advocates for the parties the elders’ award was set aside on 1st March 1996 before Hon. E.M. Mutahi (RM). The matter was to be heard and determined by the court hence the parties thereafter fixed the matter for hearing on several occasions but both the Plaintiffs’ father and the Defendant’s father died before the matter could be resolved.

37. The court, therefore, finds no evidence on record to support the Defendant’s contention that Mugane’s acquisition of ½ share in the suit property vide entry No. 4 of the land register was ever declared to be irregular by the succession court. Moreover, that entry was not made pursuant to any succession proceedings and this court does not see how it could be successfully challenged in succession proceedings. The court, therefore, answers the 2nd issue in the affirmative and in the Plaintiffs’ favour.

38. The 3rd issue is whether the Plaintiffs’ suit is fatally defective or *res judicata* on account of the existence of *Embu H.C. Succession Cause No. 886 of 2002*. Although the Defendant contended in his further amended plaint and counter claim that the issues raised in this suit were heard and determined in that succession cause, this issue was not pursued at the hearing and in his written submissions. The court is,

therefore, entitled to hold that the issue has been abandoned. Moreover, the Defendant did not produce the judgement or decree in that succession cause to demonstrate that the instant suit is *res judicata* or otherwise barred by virtue of any other law. In fact, the material on record indicates that the Defendant is the administrator in that succession cause and that the grant has never been confirmed as there are several protestors challenging the confirmation.

39. The 4th issue is whether the Plaintiffs are entitled to the reliefs sought in the plaint. The court has already found that the Plaintiffs are legitimately registered as proprietors of ½ share of the suit property. The court is of the view that where ownership is in common as opposed to joint ownership, then such ownership is divisible. Each common proprietor's share in the suit property is usually indicated in the land register. There is no doubt from the material on record that the Plaintiffs are registered as proprietors of ½ of the suit property being the share Mugane held in the suit property.

40. The court is of the opinion that the Plaintiffs are entitled to enjoy their proprietorship rights without waiting for the conclusion of the confirmation hearing in *Succession cause No. 886 of 2002 – In the matter of the estate of Njeru Wamishi* since there are several protests to the mode of distribution. On the other hand, the beneficiaries of the estate of Mugane have already agreed on the mode of distribution in consequence whereof a certificate of confirmation of grant was issued on 28th February 2000 in *Succession Cause No. 9 of 2016*.

41. The Defendant opposed the prayer for eviction on the ground that no sub-division has taken place and that there were no beacons on the ground to separate what belongs to the estate of Wamishi from the half belonging to the estate of Mugane. The 1st Plaintiff contended that the beacons which were placed on the ground were destroyed or uprooted by the Defendant since he was claiming the entire suit property.

42. The court does not agree that the Plaintiffs should be kept out of their share of the suit property indefinitely simply because the Defendant has uprooted the beacons or registered an encumbrance against the suit property to make registration of the relevant mutations impossible. There is evidence on record to demonstrate that the Defendant is occupying and utilizing the entire suit property to the exclusion of the Plaintiffs or the estate of Mugane.

43. In the circumstances, the court is inclined to order eviction of the Defendant from ½ of the suit property since there is evidence on record that a survey of the suit property was undertaken by a licenced surveyor and the relevant mutations prepared. There is some evidence on record that the beacons were removed by the Defendant who is in possession of the entire land. A copy of the relevant mutation form was tendered in evidence which showed that the suit property was sub-divided into two equal parcels being parcel Nos. 13247 and 13248. Moreover, in his summons for revocation of grant dated 17th September 2013 the Defendant stated in paragraph (c) thereof as follows:

“That the registration of the respondents as the proprietors of L.R. Gaturi/Nembure/13247 and 13248 which are the resultant sub-divisions of land parcel No. Gaturi/Nembure/2657 pursuant to a grant issued on the 28th day February 2000 be cancelled as the same was obtained without jurisdiction.”

44. It is therefore evident that all concerned parties are aware of the sub-division even though the mutation has never been registered due to some encumbrances in the land register. In case of any challenges in establishing the boundaries the County Land surveyor shall re-establish and mark out the boundaries as per the mutation of the licenced Surveyor which was tendered in evidence as Exhibit P.5.

45. The 5th issue is whether the Defendant is entitled to the reliefs sought in the counterclaim. The court has already found and held that the Defendant has failed to prove that there was fraud in Mugane's acquisition of ½ of the suit property. The court has also found that the Defendant has failed to demonstrate that Mugane's acquisition of the said share was declared to have been irregular in *Embu Principal Magistrate's Succession Cause No. 87 of 1985*. In a nutshell, the Defendant has simply failed to prove his counter-claim to the required standard. It would, therefore, follow that the Defendant is not entitled to the orders sought in the counterclaim.

46. The final issue relates to costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful litigant should normally be awarded costs of an action unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Ltd Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason to deprive the successful litigants of the costs of the action. Consequently, the Plaintiffs shall be awarded costs of the suit.

47. The upshot of the foregoing is that the court finds that the Plaintiffs have proved their claim to the required standard whereas the Defendant has failed to prove his counter-claim to the required standard. Consequently, the court shall make the following orders for disposal of the suit and counter-claim:

- a) An order of eviction of the Defendant from one half of *Title No. Gaturi/Nembure/2657* be and is hereby issued subject to the County Land Surveyor pointing out the boundaries separating the portions marked as parcel Nos. 13247 and 13248 as per the mutation form dated 11th January 2013.
- b) The Defendant's counterclaim is hereby dismissed in its entirety.
- c) The Plaintiffs are hereby awarded costs of the suit and costs of the counterclaim.
- d) The Plaintiffs are hereby awarded interest on costs at court rates.

48. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **11TH DAY** of **JULY, 2019**

In the presence of Ms. Muriuki holding brief for Ms. Muthoni for Plaintiffs and Ms. Ndorongo holding brief for Mr. Otwere for the Defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

11.07.19